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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 DANNY STEPHEN McMANUS,

11 Petitioner,

12 v.

13 W.J. SULLIVAN,

14 Respondent.
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) Case No. CV 17-6057 SJO(JC)

) ORDER ACCEPTING FINDINGS,
) CONCLUSIONS, AND
) RECOMMENDATIONS OF
) UNITED STATES MAGISTRATE
) JUDGE

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17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of
18 Habeas Corpus (“Petition”), the submissions in connection with the Motion to
19 Dismiss the Petition, and all of the records herein, including the June 18, 2018
20 Report and Recommendation of United States Magistrate Judge (“Report and
21 Recommendation”). The Court approves and accepts the Report and
22 Recommendation.

23 THE COURT HEREBY FINDS:

- 24 (1) Grounds Four and Five of the Petition are unexhausted; and
25 (2) the Petition is “mixed”.

26 THE COURT HEREBY ORDERS:

- 27 (1) Petitioner shall elect one of the following options within 14 days of
28 the issuance of this Order:

- 1 (a) voluntarily dismiss the Petition without prejudice under Federal
2 Rule of Civil Procedure 41(a)(1), with the understanding that
3 any later petition may be time-barred under 28 U.S.C.
4 § 2244(d)(1);
- 5 (b) (i) file a first amended petition omitting the unexhausted claims
6 (Grounds Three and Four) and containing only exhausted
7 claims or voluntarily dismiss the aforementioned unexhausted
8 claims from the instant Petition; and (ii) elect to proceed only
9 on the exhausted claims in the Petition/first amended petition
10 with the understanding that he thereby risks forfeiting
11 consideration of the unexhausted claims in federal court, even if
12 he subsequently does exhaust such claims;
- 13 (c) (i) file a first amended petition omitting the unexhausted claims
14 (Grounds Three and Four) and containing only exhausted
15 claims or voluntarily dismiss the aforementioned unexhausted
16 claims from the instant Petition; and (ii) seek a stay of the then
17 fully exhausted Petition/first amended petition under Kelly v.
18 Small, 315 F.3d 1063 (9th Cir. 2003) (as amended) (allowing
19 for stays of fully exhausted federal petitions without showing of
20 good cause), with the understanding that he will be allowed to
21 amend the operative Petition/first amended petition to add any
22 newly exhausted claims only if the claims are timely or “relate
23 back” to the original exhausted claims (see Mayle v. Felix, 545
24 U.S. 644, 664 (2005)); or

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1 (d) request that the Petition, in its current “mixed” form, be stayed
2 pursuant to Rhines v. Weber, 544 U.S. 269, 277 (2005), if he
3 can show (i) good cause for his failure earlier to exhaust the
4 unexhausted claims in state court; (ii) the unexhausted claims
5 are not plainly meritless; and (iii) he has not engaged in abusive
6 litigation tactics or intentional delay;

7 **(4) Petitioner’s failure to comply with this Order may result in the**
8 **dismissal of the Petition and this action based upon the “mixed”**
9 **nature of the Petition, petitioner’s failure to comply with this**
10 **Order, and/or petitioner’s failure to prosecute; and**

11 (5) The Court defers ruling on the Motion to Dismiss until petitioner
12 elects one of the foregoing options or the expiration of the deadline to
13 do so.

14 IT IS SO FOUND AND ORDERED.

15 DATED: July 30, 2018.

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18 HONORABLE S. JAMES OTERO
19 UNITED STATES DISTRICT JUDGE
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